IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 31966

STATE OF IDAHO,	)	
	)	**2006 Opinion No. 37**
Plaintiff-Respondent,	)	
	)	**Filed: May 30, 2006**
v.	)	
	)	**Stephen W. Kenyon, Clerk**
JOSHUA ALLEN ROSE,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Thomas F. Neville, District Judge.

Order revoking probation and executing previously suspended unified sentence of six years, with a minimum period of confinement of one year, for grand theft by possession of stolen property, affirmed.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Carol L. Chaffee, Deputy Attorney General, Boise, for respondent.

PERRY, Chief Judge

Joshua Allen Rose appeals from the district court's order revoking his probation and executing his previously suspended unified sentence of six years, with a minimum period of confinement of one year, for grand theft by possession of stolen property. We affirm.

I.

FACTS AND PROCEDURE

In November 2002, Rose pled guilty to grand theft by possession of stolen property. The district court sentenced Rose to a unified term of six years, with a minimum period of confinement of one year. The district court then suspended the sentence and placed Rose on probation for six years. In August 2004, Rose admitted to violating the terms of his probation. The district court reinstated Rose's probation and ordered that he serve additional time in jail as a condition thereof. Upon release from jail, Rose was required to keep his probation officer

informed of where he was living and to respect a 10:00 p.m. curfew. In January 2005, the state filed a motion alleging that Rose had violated the terms of his probation by failing to obtain written permission before changing residences, using methamphetamine, using cocaine, and absconding from supervision on January 7, 2005.

At the evidentiary hearing to determine whether Rose violated the terms of his probation, a man testified that he worked as the housing coordinator of a home for persons recovering from addiction to drugs or alcohol. The coordinator testified that, in October 2004, Rose began living in the home and, near the end of October, the coordinator discovered Rose was not respecting the home's 10:00 p.m. curfew. The coordinator indicated that, pursuant to the home's standard procedure for the violation of house rules, he required Rose to submit to a urinalysis in the coordinator's presence. According to the coordinator, the urinalysis results indicated the presence of methamphetamine and cocaine. After Rose denied taking those drugs, the coordinator administered a second urinalysis, which revealed the same results. The coordinator therefore evicted Rose from the home.

On cross-examination, Rose questioned the coordinator about whether Rose had informed the coordinator he was taking Zyprexa, an antipsychotic medication, and whether Zyprexa would interfere with the validity of the urinalysis results. The coordinator testified that he did not know whether Zyprexa would interfere with validity of the results. The coordinator indicated that generally, when a resident indicates he or she is taking a prescription medication, the coordinator calls a pharmacy to ascertain whether the medication would interfere with the urinalysis results. According to the coordinator, his notes did not indicate Rose informed the coordinator that Rose was taking any prescription medication or that the coordinator called the pharmacy.

Rose's probation officer testified that she began supervising Rose in December 2004. The probation officer indicated that another probation officer had previously supervised Rose but that officer had been deployed to the war in Iraq. The probation officer testified that, when she began supervising Rose, she received the file that had been maintained by the previous probation officer. The probation officer testified concerning the contents of the previous probation officer's notes, which he made after Rose was evicted from the recovery home. Rose objected, asserting that allowing the probation officer to testify about entries made by someone else was impermissible hearsay and violated his right to confrontation. The district court overruled

Rose's objection, finding that neither the rule against hearsay nor the right to confrontation applied in probation revocation proceedings and that the probation officer's notes were reliable. The probation officer testified that, according to the previous probation officer's notes, Rose did not immediately contact the probation officer following his eviction from the recovery home.

The probation officer testified that she met Rose on December 23, 2004, at which time Rose informed her that he was living with his grandmother. On January 7, 2005, the probation officer indicated that, according to an e-mail she received from the police department, Rose was seen waiting for a taxi to take him to a motel. The probation officer testified that she called Rose's grandmother's residence looking for Rose, and the grandmother indicated Rose had not been there for three days. The probation officer then called Rose's girlfriend and the girlfriend's mother, who informed the probation officer that they did not know where Rose was and that they were worried about him. Rose objected, asserting that allowing the probation officer to testify about the e-mail's contents and the statements of Rose's grandmother, girlfriend, and the girlfriend's mother violated his right to confrontation. The district court overruled the objection, finding that the reliability of such evidence went to its weight rather than admissibility. The probation officer testified that she went to the motel referred to in the e-mail and discovered Rose had stayed there recently but had not been at the motel for three days. The probation officer indicated Rose did not contact her to inform her of a change in residence and she did not know where to find him.

Rose testified that, prior to the administration of the urinalyses, he had been taking Zyprexa. Rose indicated that, at the time the coordinator administered the urinalyses, the coordinator did not ask Rose whether he was taking any prescription medications. Rose asserted that he had taken neither methamphetamine nor cocaine. Rose testified that he lived with his grandmother from the time he met with the new probation officer in December 2004 until he was arrested for the probation violations on January 21, 2005. Rose's grandmother testified that Rose's belongings were still at her residence, and she believed Rose lived with her until he was arrested on January 21. The grandmother indicated that she often went to bed at 9:00 p.m. or 10:00 p.m. and that Rose stayed up later. The grandmother testified that, on the day she received a call from Rose's probation officer, she and Rose had an argument, Rose left, and did not return. The grandmother testified that she could not remember whether, in January 2005, Rose was ever in her house before she went to bed.

The state recalled the probation officer and she testified about a telephone call she had placed to the laboratory that the Department of Probation and Parole used for conducting urinalyses. The probation officer indicated that, according to the laboratory technician she spoke with, Zyprexa would not affect the results of a urinalysis for methamphetamine and cocaine. Rose objected to this testimony, asserting that its admission violated his right to confrontation. The district court overruled the objection. The district court asked the probation officer where the laboratory was located. The probation officer indicated that she did not know but that she had used a toll free number in placing the telephone call.

At the close of evidence, the state moved to dismiss the allegation that Rose failed to inform his probation officer of his change in residence after being evicted from the recovery home, which the district court granted. The district court found that the testimony was credible regarding whether Zyprexa would have affected the urinalysis results. The district court determined that substantial evidence supported the allegations Rose had used cocaine, used methamphetamine, and absconded from supervision and, thus, found him to be in violation of his probation. Thereafter, the district court revoked Rose's probation and imposed his sentence. Rose appeals, arguing that the admission of hearsay evidence violated his right to due process of law and to confront adverse witnesses.

II.

ANALYSIS

It is within the trial court's discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2602, 19-2603, 20-222; *State v. Done*, 139 Idaho 635, 636, 84 P.3d 571, 572 (Ct. App. 2003). During probation revocation proceedings, two threshold questions are presented--whether the probationer violated the terms of probation and, if so, whether probation should be revoked. *Done*, 139 Idaho at 637, 84 P.3d at 573; *State v. Corder*, 115 Idaho 1137, 1138, 772 P.2d 1231, 1232 (Ct. App. 1989). In this case, Rose challenges the constitutionality of the procedures used to find that he violated his probation and does not challenge the procedures used to revoke his probation after violations were found.

It is important to note that probation revocation proceedings are altogether different from an actual criminal trial. *State v. Murillo*, 135 Idaho 811, 813, 25 P.3d 124, 126 (Ct. App. 2001); *State v. Nez*, 130 Idaho 950, 953, 950 P.2d 1289, 1292 (Ct. App. 1997). In a probation revocation proceeding, the Idaho Rules of Evidence do not apply. I.R.E. 101(e)(3); *State v.*

Peters, 119 Idaho 382, 382, 807 P.2d 61, 61 (1991); *Murillo*, 135 Idaho at 813, 25 P.3d at 126. Additionally, a violation need not be proven beyond a reasonable doubt. *Murillo*, 135 Idaho at 813, 25 P.3d at 126; *State v. Roy*, 113 Idaho 388, 390, 744 P.2d 116, 118 (Ct. App. 1987).

Nonetheless, throughout probation revocation proceedings, the probationer is entitled to due process. *State v. Kelsey*, 115 Idaho 311, 314, 766 P.2d 781, 784 (1988); *Done*, 139 Idaho at 637, 84 P.3d at 573. The same minimum due process rights apply to proceedings to revoke parole and probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Loomis v. Killeen*, 135 Idaho 607, 610-11, 21 P.3d 929, 932-33 (Ct. App. 2001). These due process rights include the right to confront and cross-examine adverse witnesses unless the trial court finds good cause for not producing the witness. *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972); *State v. Hass*, 114 Idaho 554, 556, 758 P.2d 713, 715 (Ct. App. 1988).

Initially, we address Rose's contentions that he was not allowed to review the probation officer's file and that the probation officer should not have been allowed to testify about the contents of the file and the statements of Rose's grandmother. Any error, defect, irregularity, or variance, which does not affect substantial rights, shall be disregarded. I.C.R. 52; *State v. Peteja*, 139 Idaho 607, 609, 83 P.3d 781, 783 (Ct. App. 2003).

The information contained in the previous probation officer's notes was relevant to the allegation that Rose violated his probation by failing to inform his probation officer that he changed residences after being evicted from the recovery home. The district court dismissed that allegation upon the state's motion. Further, because Rose called his grandmother to testify on his behalf, Rose was not deprived of the right to confront and cross-examine his grandmother as a witness. Accordingly, although Rose did not review the probation officer's file and the probation officer was allowed to testify about the file's contents and the grandmother's statements, Rose's substantial rights could not have been affected and, therefore, we do not address those issues further.

A. Right to Confrontation

Rose argues that the use of the probation officer's testimony to admit the contents of the e-mail from the police and the statements of Rose's girlfriend, the girlfriend's mother, and the laboratory technician violated his right to confrontation as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004). The Confrontation Clause of the Sixth Amendment indicates that, "in all

criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In *Crawford*, the United States Supreme Court held that, before testimonial hearsay evidence is admissible in a criminal trial, the Confrontation Clause demands unavailability and a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 68. Unlike criminal prosecutions, revocation of parole deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of certain restrictions. *Morrissey*, 408 U.S. at 480. Revocation proceedings should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial. *Morrissey*, 408 U.S. at 489. Further, the right to confront and cross-examine adverse witnesses in revocation proceedings is derived not from the Confrontation Clause of the Sixth Amendment but, instead, from the Due Process Clause of the Fourteenth Amendment. *People v. Johnson*, 18 Cal. Rptr. 3d 230, 232 (Ct. App. 2004); *People v. Turley*, 109 P.3d 1025, 1026 (Colo. Ct. App. 2004); *State v. Abd-Rahmaan*, 111 P.3d 1157, 1160 (Wash. 2005).

Although a defendant in a probation revocation proceeding has the right to confront witnesses, it is not equivalent to that afforded a criminal defendant at trial. *State v. Farmer*, 131 Idaho 803, 806, 964 P.2d 670, 673 (Ct. App. 1998). Accordingly, a number of jurisdictions have concluded that the rule set forth in *Crawford* does not apply in probation revocation and similar proceedings. *See United States v. Williams*, 443 F.3d 35, 45 (2d Cir. 2006); *United States v. Kelley*, ___ F.3d ___, ___ (7th Cir. 2006); *Ash v. Reilly*, 431 F.3d 826, 829-30 (D.C. Cir. 2005); *United States v. Rondeau*, 430 F.3d 44, 47-48 (1st Cir. 2005); *United States v. Hall*, 419 F.3d 980, 985-86 (9th Cir. 2005), *cert. denied*, *Hall v. United States*, ___ U.S. ___ (2005); *United States v. Kirby*, 418 F.3d 621, 627-28 (6th Cir. 2005); *Johnson*, 18 Cal. Rptr. 3d at 232; *Turley*, 109 P.3d at 1026; *Young v. United States*, 863 A.2d 804, 807-08 (D.C. 2004); *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1247-48 (Mass. 2006); *Abd-Rahmaan*, 111 P.3d at 1160-61. We now join these jurisdictions and hold that *Crawford* did not govern the proceedings used to determine whether Rose was in violation of his probation.[1]

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[1] We note that in *Nez* this Court relied on *Idaho v. Wright*, 497 U.S. 805 (1990), a case interpreting the Confrontation Clause, in determining whether a probationer's right to confrontation was violated. *See Nez*, 130 Idaho at 954-55, 950 P.2d at 1293-94. In *Nez*, the

B. Due Process

Rose argues that the use of the probation officer's testimony to admit the contents of the e-mail from the police and the statements of Rose's girlfriend, the girlfriend's mother, and the laboratory technician violated his right to due process. Rose also contends that, even if the admission of each incident of hearsay testimony was harmless standing alone, the accumulation of those incidents demonstrate the absence of a fair proceeding to determine whether he violated the terms his probation.

When determining whether the admission of hearsay evidence violates a defendant's due process right to confront witnesses in revocation proceedings, courts weigh the defendant's interest in confrontation against the state's good cause for denying it. *Hall*, 419 F.3d at 986; *Farmer*, 131 Idaho at 806, 964 P.2d at 673. In evaluating the defendant's interest, the court should weigh the defendant's right to confrontation under the specific circumstances presented in that case. *Farmer*, 131 Idaho at 807, 964 P.2d at 674. The weight to be given the right to confrontation in a particular case depends on the importance of the hearsay evidence to the trial court's ultimate finding and the nature of the facts to be proven by the hearsay evidence. *United States v. Comito*, 177 F.3d 1166, 1171 (9th Cir. 1999). The more significant particular evidence is to a finding, the more important it is that the defendant be given an opportunity to demonstrate that the proffered evidence does not reflect a verified fact. *Id.* Similarly, the defendant's interest in testing the evidence by exercising the right to confrontation increases in relation to the uncertainty of the evidence's reliability. *Id.*

In evaluating good cause, courts look to both the difficulty of procuring witnesses and the reliability of the evidence. *Rondeau*, 430 F.3d at 48; *Farmer*, 131 Idaho at 807, 964 P.2d at 674. Whether a particular reason is sufficient cause to outweigh the right to confrontation will depend

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defendant contended that a probation officer's testimony regarding notes in his probation file made by a previous probation officer violated his right to confrontation. This Court concluded that, because the file entries at issue fell under the business records and public records exceptions to the rule against hearsay, the defendant's right to confrontation was not violated. *Nez*, 130 Idaho at 956, 950 P.2d at 1295. However, *Nez* did not hold that the full protections of the Confrontation Clause apply to revocation of probation and, instead, recognized that a probation revocation hearing is altogether different from a criminal trial. *See Nez*, 130 Idaho at 953-56, 950 P.2d at 1292-95.

on the strength of the reason in relation to the significance of the defendant's right. *Comito,* 177 F.3d at 1172. Where the hearsay evidence sought to be admitted at a revocation proceeding bears substantial guarantees of trustworthiness, the need to show a reason for the witness' absence vanishes. *Kelley,* ___ F.3d at ___; *State v. James*, 797 A.2d 732, 735-36 (Me. 2002). Where the proffered out-of-court statement would be admissible under an established exception to the rule against hearsay, it is presumptively reliable. *Nez,* 130 Idaho at 955, 950 P.2d at 1294; *James,* 797 A.2d at 736. Thus, the admission of such statements does not violate the due process right to confrontation. *See Williams*, 443 F.3d at 45; *Hall,* 419 F.3d at 987.

Additionally, even if there is no good cause, a defendant in a revocation proceeding is not entitled to a new hearing unless the inability to cross-examine was prejudicial. *Ash,* 431 F.3d at 830. Whether a witness' absence was prejudicial depends on the quality and quantity of the nonhearsay and reliable hearsay evidence supporting the decision to revoke. *Id.* Where nonhearsay evidence introduced at the evidentiary hearing alone is sufficient to sustain an allegation, the hearsay evidence could not have significantly affected the court's ultimate finding. *Hall,* 419 F.3d at 986.

1. E-mail and statements of the girlfriend and her mother

In this case, the probation officer's testimony about the contents of the e-mail and the statements of Rose's girlfriend and her mother was introduced to support the allegation Rose violated his probation by absconding from supervision on January 7, 2005. In overruling Rose's objection to this hearsay, the district court made no findings as to whether the testimony was reliable or whether it would be difficult for the state to produce those witnesses. Further, the answer to those inquiries is not apparent from the record.

Nevertheless, disregarding that hearsay, the probation officer's testimony established that Rose had informed his probation officer he was living with his grandmother and that he was required to be at his designated residence by 10:00 p.m. every night. The probation officer's testimony revealed that, on January 7, she attempted to contact Rose by telephone at the residences of his grandmother, girlfriend, and her mother and was unable to find Rose at those locations. The probation officer went to a motel and discovered that Rose had been staying there but had not been at the motel for three days. The probation officer also testified that, although Rose was required to inform her of where he was residing at all times, Rose did not inform her that he was no longer staying with his grandmother and, on January 7, she had no idea where to

find him. Rose's grandmother testified that on the day the probation officer called looking for Rose, Rose had become angry and left. The grandmother indicated that she assumed Rose would be back and that, when she did not see him, she assumed he must be staying with his girlfriend and would return any day. However, the grandmother indicated that Rose did not return and that between the day the probation officer called her and when Rose was arrested, she could not recall if Rose had ever been in the house before she went to bed.

The probation officer's testimony regarding the police officer's e-mail and the statements of Rose's girlfriend and her mother was minimally relevant to whether Rose absconded from supervision and, thus, Rose's interest in confrontation of those witnesses was entitled to little weight. Further, because substantial evidence aside from the hearsay testimony supported the district court's determination that Rose absconded from probation on January 7, the probation officer's testimony regarding the police officer's e-mail and the statements of Rose's girlfriend and her mother could not have significantly affected the district court's ultimate finding. Accordingly, even though we are unable to determine whether the state had good cause for not producing the police officer who sent the e-mail, Rose's girlfriend, and the girlfriend's mother, we conclude that Rose's right to due process was not violated by the admission of those witnesses' out-of-court statements.

2. Laboratory technician's statements

Rose alleged that he had been taking Zyprexa and that Zyprexa could have caused the urinalyses to incorrectly indicate the presence of methamphetamine and cocaine. In response, the probation officer testified that, according to the laboratory technician she spoke with, Zyprexa would not have affected the urinalysis results. Rose contends that, because the district court found the technician's statements to be reliable, such hearsay testimony was important to the district court's decision and deprived him of the right to cross-examine the technician.

The housing coordinator who administered the urinalyses testified that, according to the results, Rose had used methamphetamine and cocaine. On cross-examination Rose questioned the coordinator extensively regarding the reliability of the testing procedures, the coordinator's familiarity with the test, and whether Rose informed the coordinator that he was taking Zyprexa. Aside from his own testimony, Rose submitted no evidence to support his assertions that he had been taking Zyprexa at the time of the urinalyses or that Zyprexa could have affected the results.

By presenting the housing coordinator's testimony, the state introduced sufficient evidence to meet its burden of proving that Rose had used cocaine and methamphetamine. Once the state presented prima facie proof showing that Rose violated a condition of probation, Rose had the burden of coming forward with evidence to meet and overcome that proof. *See State v. Graham*, 30 P.3d 310, 313 (Kan. 2001). Rose's testimony that he was taking Zyprexa at the time of the urinalyses, without any supporting evidence such as pharmacy records confirming Rose had been taking Zyprexa and expert testimony regarding Zyprexa's likely effect on the results, was insufficient to meet this burden. Accordingly, the state did not need to rebut Rose's contention that Zyprexa could have affected the validity of the urinalysis results and the probation officer's testimony regarding the laboratory technician's statements was unnecessary for the state to sustain its burden of proof.

We conclude that, disregarding the probation officer's testimony regarding the laboratory technician's statements, substantial evidence supported the district court's finding that Rose used methamphetamine and cocaine. There was no substantial evidence to the contrary. Therefore, even if the district court erred by allowing that testimony, its admission could not have significantly affected the district court's ultimate decision and did not violate Rose's due process right to confront witnesses.

3. Cumulative error

Rose contends that, even if the admission of each incident of hearsay did not violate his right to due process standing alone, the cumulative effect of such hearsay deprived him of his right to a fair proceeding. The cumulative error doctrine refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, show the absence of a fair trial in contravention of the defendant's right to due process. *State v. Moore*, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998). The presence of errors alone, however, does not require the reversal of a conviction because, under due process, a defendant is entitled to a fair trial, not an error-free trial. *Id.*

Substantial nonhearsay evidence supported the district court's determinations that Rose absconded from supervision and used methamphetamine and cocaine. Therefore, the admission of the hearsay complained of by Rose could not have significantly affected the district court's ultimate finding that Rose violated his probation. Accordingly, we conclude that, even if the

district court erred by allowing the admission of the hearsay evidence, such admission did not deprive Rose of his right to a fair proceeding to determine whether he had violated his probation.

III.

CONCLUSION

The United States Supreme Court's decision in *Crawford*, which interpreted the Confrontation Clause of the Sixth Amendment, did not govern the proceedings used to find Rose in violation of his probation. Furthermore, Rose's due process right to confront witnesses under the Fourteenth Amendment was not violated by allowing the probation officer to testify about the contents of the e-mail from a police officer and the statements made by Rose's girlfriend, the girlfriend's mother, and the laboratory technician. Accordingly, the district court's order revoking Rose's probation and executing his previously suspended sentence is affirmed.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**